IDEOLOGICAL RESPONSES TO THE CORONAVIRUS PANDEMIC: CHINA AND ITS OTHER

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Abstract

This Article discusses the ongoing coronavirus pandemic as an instance of ideological contestation between the People’s Republic of China and its ideological Other—the “Western” liberal democracies. Much of this ideological contestation highlights the idiosyncratic aspects of opposing ideological narratives. From the illiberal perspective, promoters of liberal narratives on governance and public health can be said to focus too much on procedural legitimacy and, consequently, appear to be ill-placed to acknowledge and respond to public health emergencies. Conversely, from the liberal perspective, advocates of illiberal narratives appear to be responding to a never-ending emergency and, consequently, seem unable to take full advantage of procedural legitimacy and rule-based governance in order to prevent public health emergencies from occurring. The coronavirus pandemic also exposes the aspirational qualities of both ideological narratives. On one hand, it appears aspirational to assume that the coronavirus response in liberal democratic countries can be based on the respect for individual freedom, human dignity, and other liberal first principles. On the other hand, the image of a strong, stable government projected by the CCP also seems to be based on aspirational notions about the coherence and resilience of the P.R.C.’s governance project. In the middle of the pandemic, it appears that the coronavirus follows no ideological script.

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I. INTRODUCTION

Does illiberal political thought provide a more effective means for managing public health emergencies, such as the ongoing COVID-19 (“coronavirus”) pandemic, than a self-consciously liberal approach to public health? Answers to this question relate to a central point of contestation in contemporary political thought: Namely, whether an illiberal government, which defines itself by its willingness to restrict and suspend individual rights, is more effective in tackling political emergencies and economic and developmental challenges than a liberal government.¹

¹ For recent discussion on the respective merits of liberalism and different forms of illiberalism (mainly authoritarianism) in the coronavirus pandemic, see, for example, Florian Bieber, Authoritarianism in the Time of the Coronavirus, FOREIGN POL’Y (Mar. 30, 2020), https://foreignpolicy.com/2020/03/30/authoritarianism-coronavirus-lockdown-pandemic-populism [https://perma.cc/WB6P-G8VL] (discussing how COVID-19, like other pandemics, is subject to abuse under both authoritarian and democratic regimes); Francis Fukuyama, The Pandemic and Political Order: It Takes a State, FOREIGN AFF. (July/Aug. 2020), https://www.foreignaffairs.com/articles/world/2020-06-09/pandemic-and-political-order [https://perma.cc/4LU8-ZJSB] (arguing that the particular regime type may not matter when responding to crises, and explaining the effectiveness of a government’s coronavirus response on the basis of factors such as a “competent state apparatus, a government that citizens trust . . . and effective leaders”); Matthew M. Kavanagh, Authoritarianism, Outbreaks, and Information Politics, 5 LANCET PUB. HEALTH (Mar. 2020), https://www.thelancet.com/action/showPdf?pii=S2468-2667%2820%2930030-X [https://perma.cc/TET2-S2FP] (suggesting that China’s authoritarian regime may
As of August 2020, it is too early to draw conclusions about the efficiency of liberal and illiberal responses to the coronavirus pandemic. In fact, the time may never be ripe for drawing final conclusions about the pandemic, as ideological narratives allow their promoters to justify even the most inconvenient facts. Be that as it may, even in the middle of the pandemic, it is still possible to examine the challenges against various ideological narratives on public health emergencies. It seems particularly fruitful to view such challenges in the context of the ideological contestation—and “Othering”—between the People’s Republic of China (“the P.R.C.”) and “Western” liberal democracies.  

Much of North American and European commentary on the Chinese government’s coronavirus response uses what could be considered liberal narratives on public health. At play in this commentary are two distinct approaches to the relationship between human rights and public health. The first, more conventional approach views human rights as checks and balances for public health measures, suggesting that there is a trade-off between human rights and public health. The government may restrict specific rights, such as the freedom of movement, in public health emergencies, but these restrictions must be necessary, proportional, and non-discriminatory.  

1 For China and “the Orient” as the Other of Europeans, see Teemu Ruskola, Legal Orientalism, 101 Mich. L. Rev. 179, 197 (2002) (discussing how the West differentiates itself from China); Teemu Ruskola, Where Is Asia? When Is Asia? Theorizing Comparative Law and International Law, 44 U.C. Davis L. Rev. 879, 882 (2011) (describing the Orient as Europe’s first Other). Conversely, Western liberal democracies act as the Other in the Chinese ideological discourse. See infra text accompanying notes 104–106. 

2 According to the Siracusa Principles, restrictions on rights must be, inter alia, provided for by the law, applied in a non-arbitrary and non-discriminatory manner, pursue a legitimate aim, be proportional to their aims, and constitute the least restrictive means available. ECOSOC, Siracusa Principles on the Limitation of Human Rights, art. 5, U.N. Doc. E/CONF. 80/40, Apr. 17, 1991 (entered into force July 1, 1992). 

3 Zhao Yanjing (赵燕菁), Jinkuai Jianli Zhongguo Kangyi de Hexin Xushi [尽快建立中国抗疫的核心叙事] [Establish a Core Narrative for China’s Fight Against the Epidemic As Soon As Possible], AISI Xiang (April 10, 2020), http://www.aisixiang.com/data/120808.html [https://perma.cc/WU7X-TNFM] (discussing China’s rebuttal to the Western critiques of China’s initial handling of the coronavirus pandemic).
The second, more recently developed human rights-based approach to health contends that the trade-off between human rights and public health is unnecessary. Instead, this approach suggests that the implementation of human rights obligations (e.g., freedom of expression and the right to information) correlates positively with the attainment of public health objectives. The former approach facilitates normative assessments of public health measures, whereas the latter approach provides an empirical and normative argument about the mutually reinforcing linkages between health and human rights.

The human rights-based approach is particularly important for understanding the ideological contestation regarding the coronavirus pandemic. This approach suggests that the illiberal nature of China’s governance model (including the lack of rights protections in the P.R.C.) was a catalyst for the coronavirus pandemic. The outline of this narrative is presently as follows: local authorities in Wuhan, accustomed to repressing inconvenient truths and appeasing their superiors, silenced early warnings about the virus, allowing it to spread unnoticed.


Salvatore Babones, The ‘Chinese Virus’ Spread Along the New Silk Road, Foreign Pol’y (Apr. 6, 2020), https://foreignpolicy.com/2020/04/06/chinese-coronavirus-spread-worldwide-on-new-silk-road/ [https://perma.cc/9QA6-XPD]; Kavanagh, supra note 1; Pei, supra note 1. Chinese scholars are aware of this narrative and the strategic need to respond to it. See Zhao, supra note 1.

isolate, and treat infected people.\(^7\) Up to five million people left Wuhan, the epicenter of the outbreak, in anticipation of strict quarantine measures, helping the virus to spread domestically and internationally.\(^8\) These people and other citizens from Hubei, the province in which Wuhan is located, faced discrimination elsewhere in China, deterring them from seeking medical attention and further worsening the outbreak.\(^9\) From this perspective, the coronavirus pandemic was a consequence of the pathologies of illiberalism.

Illiberal political thought also views public health through its internal ideological prism. In the imagination of nineteenth and twentieth century theorists of, and for, dictatorial governments, the inability of liberal governments to respond to political emergencies demonstrated the need for strong, law-transcending political leadership.\(^10\) In a similar vein, Chinese commentary on the coronavirus has highlighted the unique strengths of China’s authoritarian government and the Chinese Communist Party (CCP).\(^11\) The Chinese government’s white paper on the coronavirus response

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\(^8\) *Id.*
explicitly frames its successes as a consequence of CCP leadership.\textsuperscript{12} China’s state-run media has described the Chinese government’s response to the pandemic as a “highly organized” war-like mobilization of national resources.\textsuperscript{13} Conservative voices in Chinese media have contrasted this undertaking with “Western…values of liberalism,” which prevented Western countries from adopting efficient public health measures in order to contain the pandemic in time.\textsuperscript{14}

Such critique notwithstanding, it would be a mistake to argue that the Chinese approach to the coronavirus pandemic amounts to a negation of rights and legal processes. Appeals to legality have played a role in the Chinese government’s effort to contain the pandemic. President Xi Jinping himself has called for the “strict enforcement of law on prevention and control of infectious diseases.”\textsuperscript{15} Such statements demonstrate that CCP leadership seeks to take advantage of legal processes, even if the justifications for doing so are not the same as in the liberal narratives on governance.\textsuperscript{16}

Adding another layer of nuance to the Chinese government’s approach, the Chinese Supreme People’s Court’s has given much play to pragmatic aspects of Chinese legal thought in its coronavirus response. Among other things, the Supreme People’s Court promotes the settlement of legal disputes so that businesses affected by the

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\begin{itemize}
\item \textsuperscript{12} P.R.C. STATE COUNCIL, FIGHTING COVID-19: CHINA IN ACTION (June 2020), http://english.scio.gov.cn/whitepapers/2020-06/07/content_76135269.htm [https://perma.cc/3QC5-L3NV]. For a Chinese scholar outlining this argument as a response to the liberal narrative on the pandemic, see Zhao, supra note 1.
\item \textsuperscript{13} Fighting Coronavirus is a People's War, GLOB. TIMES (Feb. 5, 2020), https://www.globaltimes.cn/content/1178655.shtml [https://perma.cc/79SN-UUAL].
\item \textsuperscript{15} Xi Stresses Law-based Infection Prevention, Control, XINHUA (Feb. 5, 2020), http://www.xinhuanet.com/english/2020-02/05/c_138758520.htm [https://perma.cc/669H-82GD].
\item \textsuperscript{16} See generally, Taisu Zhang & Tom Ginsburg, China’s Turn Toward Law, 59 VA. J. INT‘L L. 307 (2019) (discussing China’s turn towards legality).
\end{itemize}
pandemic will not go under due to short-term liquidity problems.\textsuperscript{17} In line with similar restrictions adopted through legislation in other countries, this approach places limits on the enforcement of rights of creditors and landlords during the pandemic.\textsuperscript{18}

Extra-legal measures also remain a governance tool for the Party. The CCP leadership describes its governance methods in terms of direct action, which is capable of cutting through “formalism” and “bureaucratism.”\textsuperscript{19} As a reflection of the Party leadership’s ambiguous commitment to legality in the present pandemic, some of the most extreme public health measures taken by some local Chinese governments allegedly have no basis in Chinese law.\textsuperscript{20} Finally, it is

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\textsuperscript{19} See generally Wang Zihui (王子晖), Liang Ci Zhongyao Huiyi, Xi Jinping Zhesange Yaoqiu Yiyiguanzhi (两次重要会议，习近平这三个要求一以贯之) [Two Important Meetings, Xi Jinping’s Three Consistent Requirements], XINHUA (Feb. 4, 2020), http://www.xinhuanet.com/politics/xxjxs/2020-02/04/c_1125530611.htm [https://perma.cc/RX63-SZDU] (reporting on General Secretary Xi Jinping’s “stark warning” to the supporters of formalism and bureaucratism). In Party ideology, formalism and bureaucratism are distinct from legality. See text accompanying infra notes 165-169.

\textsuperscript{20} See Shen Kui (沈岿), Dayi Zhixia Shandai Mei yige Ren de Jiben Quanli (大疫之下善待每一个人的基本权利) [Respect Each Person’s Basic Rights Under a Great Epidemic], WECHAT PKUPUBLICLAW (Feb. 17, 2020), https://mp.weixin.qq.com/s/FSqrvCo9SkEEfG1apkeE6A [https://perma.cc/587Y-XBG5] (arguing that some measures taken by the Chinese local governments potentially infringe upon people’s constitutional rights, such as the right of personal dignity, the right to adequate housing, and the right to privacy); Tong
noteworthy that the CCP’s extra-legal discipline inspection organs have set out to strengthen the ideological controls of Party cadres and state officials whose responsibility it is to respond to the crisis. Adherence to formal legality is probably not a high priority in this effort.

The ideological narratives described in this Article provide a convenient structure for legitimizing and criticizing government responses to the coronavirus pandemic. In these narratives China and liberal democracies appear as points of contrast through which the promoters of the narratives describe themselves. Much of this ideological Othering highlights the idiosyncratic aspects and endemic weaknesses of the opposing ideological outlook. From the illiberal perspective promoters of liberal narratives on governance and public health can be said to focus too much on procedural legitimacy; and consequently, they appear to be ill-placed to acknowledge and respond to public health emergencies. Conversely, from the liberal perspective advocates of illiberal narratives on governance and public health appear to be responding to a never-ending emergency situation; consequently, they are unable to take full advantage of procedural

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legitimacy and rule-based governance in order to prevent public health emergencies from occurring. These ideological narratives may not be the only way, or even the principal way, for conceptualizing governance responses to the pandemic, but neither are they without any social effects. Among other things, the narratives explain why an individual sacrifice in the face of a public health emergency is just. This may be because the individual is presumed to have consented to the laws on which coercive measures are based, or it may be because the governing political movement—in China, the CCP—is presumed to represent everybody’s interests, including the interests of those people who are subject to coercive measures.23

Adopting an external perspective to both liberal and illiberal ideological narratives, this Article argues that the coronavirus pandemic exposes aspirational qualities of both these narratives. On one hand, the similarity between the coercive methods adopted in liberal and illiberal political regimes makes the liberal justification for public health measures seem aspirational, or outright fictitious. While various rights claims can be relevant for decision-making about public health measures,24 seeking to generate a coherent policy response on the basis of liberal first principles, such as individual freedom and autonomy, seems aspirational at best. In particular, it is by no means clear that the human rights-based approach provides a coherent policy framework for the coronavirus response.25 On the other hand, the image of a strong, stable government projected by the CCP also seems aspirational in light of the pandemic.26 The precarious nature of the Party’s governance project is highlighted by the Party leaders’ ambivalent approach to formal rights and legal processes. Formal rights and legal processes would allow inconvenient but important information to circulate freely, but such rights and processes could also open the floodgates for politically subversive speech, which could destabilize the regime.27

23 See infra text accompanying notes 106, 288–29.
25 See infra text accompanying notes 96–98.
26 For this projection, see P.R.C. STATE COUNCIL, supra note 12 (referring to “the strong leadership of the [CCP] Central Committee”).
27 See infra text accompanying notes 127–128, 171 (discussing the CCP’s conflicting ideologies towards the rule of law).
The remaining parts of this Article are organized as follows. Part II describes the conventional approach to the relationship between health and human rights. Part III focuses on the human rights-based approach to health. Part IV examines intellectual criticisms against the liberal narratives on public health. Part V describes illiberal narratives on public health through China’s response to the coronavirus outbreak. Part VI brings the liberal and illiberal narratives together and examines their aspirational qualities and endemic weaknesses. Part VII concludes.

II. LIBERAL NARRATIVES ON PUBLIC HEALTH: THE CONVENTIONAL APPROACH

At the highest level of abstraction, liberal narratives justify public health policies through principles such as individual freedom and respect for human agency, autonomy, and dignity.\(^{28}\) The provision of available and accessible healthcare services, for instance, must allow people to live “a life in dignity.”\(^{29}\) Restrictive public health measures, such as the isolation of infected patients and the quarantining of potentially infected people, must facilitate maximum space for individual freedom and respect personal dignity.\(^{30}\) Such measures can be said to be necessary only so far as they protect the freedom and human agency of others, and they are legitimate if and when they are based on democratically agreed laws.\(^{31}\)

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\(^{28}\) See John Rawls, *A Theory of Justice* 53, 513 (1999) (describing the first principle of his theory of justice as the equal right of each person to the most extensive scheme of basic liberties compatible with similar schemes for others, and arguing that equal respect for people manifests in treating them justly); Mark Tushnet, *The Possibility of Illiberal Constitutionalism?*, 69 Fla. L. Rev. 1367, 1368–69 (2017) (defining liberal constitutionalism through the principles of “the equality of all citizens” and “the priority of the right over the good”); Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 Phil. Q. 127, 128 (1987) (defining liberalism as a “commit[ment] to a conception of freedom and of respect for the capacities and the agency of individual men and women”).


\(^{31}\) Waldron, *supra* note 28, at 133; *Siracusa Principles, supra* note 3, ¶ 34.
The relationship between rights and public health can be conceived in different ways within this general conceptual framework. As mentioned in the Introduction, public health objectives have been conventionally thought to exist in a potential conflict with human rights.\textsuperscript{32} The conventional approach is enshrined, for instance, in the Siracusa Principles, which pit human rights against public health objectives.\textsuperscript{33} According to the Siracusa Principles, “public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to . . . health . . . .”\textsuperscript{34} Restrictions on rights must be provided for by the law, and they must be applied in a non-arbitrary and non-discriminatory manner.\textsuperscript{35} They must also be necessary, pursue a legitimate aim, be proportional to their aim, and constitute the least restrictive means available.\textsuperscript{36} Some rights and principles, such as the principle of non-discrimination, the right to life and the freedom from torture, are non-derogable.\textsuperscript{37} The Siracusa Principles also call for “[a]dequate safeguards and effective remedies . . . against illegal or abusive imposition or application of limitations on human rights.”\textsuperscript{38} A similar approach to conceptualizing the relationship between health and human rights is apparent in the 2005 International Health Regulations (IHR), which govern international processes for preventing the spread of communicable diseases, such as the coronavirus.\textsuperscript{39} In addition to including a general statement about the “respect for the dignity, human rights and fundamental freedoms of persons” in the implementation of the regulations, the IHR provides that states “shall treat travelers with respect for their dignity, human

\textsuperscript{32} At the same time, the conventional approach does not recognize a trade-off between individual freedom and dignity and public health. It allows rights restrictions “solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . . in a democratic society.” G.A. Res. 217 A (III), The Universal Declaration of Human Rights, art. 29(2) (Dec. 10, 1948).
\textsuperscript{33} See generally SIRACUSA PRINCIPLES, supra note 3.
\textsuperscript{34} SIRACUSA PRINCIPLES, supra note 3, ¶ 25.
\textsuperscript{35} Id. ¶¶ 5, 7, 9.
\textsuperscript{36} Id. ¶¶ 10, 11.
\textsuperscript{37} Id. ¶¶ 9, 58.
\textsuperscript{38} Id. ¶ 18.
\textsuperscript{39} WORLD HEALTH ORGANIZATION [WHO], INTERNATIONAL HEALTH REGULATIONS (2nd ed. 2005), https://apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf?sequence=1 [https://perma.cc/4WJ4-RQCR].
rights and fundamental freedoms and minimize any discomfort or distress associated with such measures. . . .  

This vocabulary allows one to make normative assessments about public health measures adopted in the present coronavirus pandemic. The cordoning off of entire cities, the monitoring of people’s movement through mandatory mobile phone applications, and the isolation of infected patients in clinics with access to adequate healthcare services can be said to satisfy the Siracusa Principles—or not, depending on how one weights the scales of justice. Some government measures may fall short of the test set out in Siracusa Principles because less restrictive and more efficient public health measures would have been available for the authorities. For instance, the policy in China’s Zhejiang province to allow only one person from a household to leave their home every two days would be compared unfavorably to equally effective, but more lenient measures adopted elsewhere in the world. Other government measures may fail the Siracusa Principles’ test because they do not yield positive health outcomes. For example, the practice in Zhejiang province to prevent people who visited heavily affected

40 Id. at art. 3, 32.
44 Id.
45 See Shen, supra note 20, for such a practice in the Zhejiang Province of China.
areas from returning to their homes led people to shelter with relatives or in hotels, potentially spreading the virus further.\textsuperscript{46}

The concept of discrimination in the Siracusa Principles is partly tied to a determination about what counts as a successful public health intervention.\textsuperscript{47} The forced evictions of specific groups of Chinese and foreign nationals, such as Nigerian people in Guangzhou, from their homes served no legitimate public health purpose and could, therefore, be seen as discriminatory under the Siracusa Principles.\textsuperscript{48} Under the conventional approach, it is also possible to think of a situation where public health measures are considered discriminatory even if their effect on public health is neutral or positive. This would be the case with a provision of otherwise appropriate and necessary health services (say, a coronavirus vaccination program) in a discriminatory or stigmatizing manner.\textsuperscript{49}

\textsuperscript{46} Id.


\textsuperscript{49} See UNAIDS, supra note 47, at 8 (explaining that certain phrases and associations should be avoided when describing how the virus is transmitted); Wang & Qin, supra note 48 (discussing how China’s approach to controlling the virus has led to patriotism, nationalism, and xenophobia); Addressing Human Rights as Key to the COVID-19 Response, WORLD HEALTH ORGANIZATION [WHO] (Apr. 21, 2020), https://apps.who.int/iris/bitstream/handle/10665/331811/WHO-2019-nCoV-SRH-Rights-2020.1-eng.pdf?sequence=1&isAllowed=y [http://perma.cc/Y2VT-V8U9] (contending that public health emergencies often lead to discrimination against
The Siracusa Principles also require that “adequate safeguards and effective remedies” be in place against illegal and abusive rights restrictions. Finally, public health measures that have no basis in law fall short of the Siracusa Principles. For instance, Chinese scholars have argued that city-wide lockdowns adopted in the beginning of the coronavirus pandemic violated Chinese laws. Even the Chinese Supreme People’s Court chastised local authorities for adopting unlawful measures to suppress information about the outbreak.
III. LIBERAL NARRATIVES ON PUBLIC HEALTH: THE HUMAN RIGHTS-BASED APPROACH

The conventional approach to public health and human rights views human rights as a counterbalance and, in the case of non-derogable rights, as trumps to public health measures. In doing so, the approach treats public health and human rights as two separate fields without emphasizing the causal relations between them. This view on health and human rights was rethought in the 1980s and 1990s, primarily due to another viral outbreak, the HIV/AIDS epidemic. Rather than conceptualizing human rights and public health objectives in terms of a conflict and a trade-off, the new approach saw human rights and public health objectives in mutually re-enforcing terms.

The change of perspective was partly motivated by the specific nature of the HIV/AIDS epidemic. Before effective treatment became available in the mid-1990s, individuals had few incentives to be tested for HIV. Instead of receiving treatment, a person who tested positive for HIV could be evicted, expelled from

53 SIRACUSA PRINCIPLES, supra note 3, ¶¶ 58–60. Non-derogable rights include, inter alia, the right to life, freedom from torture, cruel, inhuman or degrading treatment or punishment, and freedom of thought, conscience and religion.
55 Id. at 8.
schools and fired from their jobs.57 Consequently, many people chose to remain untested and thus unaware of their HIV-positive status, continuing risk behavior.58 Under the new rights-based approach eliminating discrimination against HIV-positive people was understood “as central to the global AIDS challenge as the disease itself.”59 Improving the rights of HIV-positive people (through, for instance, legal challenges to discrimination and the extensive application of disability legislation) reduced the social and economic costs of a positive HIV-test result for an individual, which further encouraged testing and ultimately decreased risk behavior.60

The new insight about the interrelatedness of health and human rights expanded from the field of HIV/AIDS to other fields of public health. According to the new human rights-based approach to health, human rights provided “public health with a coherent framework for analyzing and responding to the societal dimension of health."61 Promoters of the new approach argued, and continue to argue, that public health measures not only contribute to the attainment of social and economic rights, and most obviously to the right to health, but that they also improve the implementation of civil and political rights and the principle of non-discrimination.62 All human rights—social, economic, and cultural, as well as civil and political—contribute to the aim of promoting individual freedom and respect for human agency.63 At the same time, promoters of the rights-based approaches also presume that improving human rights

57 Id.
58 See Mann & Tarantola, supra note 54, at 6–7 (mentioning that many HIV-positive people in vulnerable population groups could not access prevention services due to, in part, social discrimination).
62 CESCR, supra note 29, ¶ 3.
63 SEN, supra note 56, at xi–xiii.
conditions contributes to the achievement of public health goals. This is the case even with civil and political rights. The human rights-based approach to health teaches, for instance, that allowing civil society groups to operate freely enables them to advocate for various health-related rights and thus improve public health conditions.

As is the case with other liberal narratives, in the human rights-based approach “the process is critical.” Human rights need to be “integrated into every component of a project and every step of the process.” The very meaning of health and other interrelated concepts, such as discrimination and human dignity, needs to be determined in a procedurally fair, human-rights-based process. This is not only a normative argument about rights but also a consequentialist argument about health. Promoters of the rights-based approaches argue that in the long run, public health policies and programs formulated in a liberal democratic process are more responsive, legitimate and effective than policies and programs that are handed down by authoritarian governments.

Arguments about the interrelatedness of health and human rights have appeared in much commentary on the ongoing coronavirus pandemic. As mentioned above, commentators in North America and Europe have suggested that the illiberal nature of China’s one-party state enabled and encouraged Chinese officials to suppress information about the outbreak in its early stages, thereby worsening the pandemic. Some outspoken liberal-minded Chinese

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65 See supra note 4.
67 Id.
70 Kavanagh, supra note 1; Steven Lee Myers & Chris Buckley, In Coronavirus, a ‘Battle’ That Could Humble China’s Strongman, N.Y. TIMES (Jan. 26, 2020,
scholars, such as Professor He Weifang of Peking University Law School, have also made the connection between liberal freedoms and public health in their public statements. He Weifang has pointed out that the central government in Beijing knew about the epidemic several weeks before they announced it and took measures against it. "Without press freedom," He Weifang concludes, "people will live in distress and the government in mendacity." A similar belief is shared by the hundreds of Chinese academics who signed a petition in the early stages of the pandemic, calling, among other things, for the freedom of expression in China. Xu Zhangrun, a politically liberal law professor, who was subsequently dismissed from his position at Tsinghua University, has expanded the argument to the systemic level. In Xu’s view, China’s illiberal political system, enabled “dangerous ‘systemic impotence’ at every level.” Other critics of the Chinese government’s response have argued that the absence of a functioning civil society in China hampered the government’s efforts in the pandemic.


72 Cai, supra note 6.


The emphasis on civil and political rights is particularly prominent in the commentary on China’s coronavirus response.\textsuperscript{77} Outside the Chinese context, much of the rights-based commentary focuses on social and economic rights.\textsuperscript{78} As is the case with past epidemics, the coronavirus pandemic has affected vulnerable groups with low socioeconomic status disproportionately.\textsuperscript{79} People in lower socio-economic groups have been most adversely economically affected by both lockdowns and workplace infections.\textsuperscript{80} Measures against the pandemic have impaired equal access to education.\textsuperscript{81} It has been easier for governments to impose rights restrictions that most affect already disadvantaged and vulnerable groups.\textsuperscript{82} The argument that inadequate protection of human rights is harming the public health response has also been raised in the present pandemic. In the United States, employees who cannot afford to take sick days due to poor employment protection and access to social and health

\textsuperscript{77} But see U.N. HUM. RTS. OFF. OF HIGH COMM’R, supra note 47, at 3 (discussing widespread racial discrimination and civil rights violations globally); UNAIDS, supra note 47, at 6–7 (discussing the relevance of democracy and freedom of speech for coronavirus measures globally).
\textsuperscript{79} Id.
\textsuperscript{80} Geoffrey Anderson et al, Using Socioeconomics to Counter Health Disparities Arising from the Covid-19 Pandemic, 369 BRIT. MED. J. 1, 3–4 (June 8, 2020), https://www.bmj.com/content/369/bmj.m2149 [https://perma.cc/S3VS-NVD9].
\textsuperscript{82} See U.N. HUM. RTS. OFF. OF HIGH COMM’R, supra note 47, at 7 (discussing the disparate impact of coronavirus on individuals in precarious employment situations).
services are more likely to contract and spread the disease.⁸³ Denying paperless immigrants access to healthcare and other services has a similar effect.⁸⁴ The rights-based approach to health, therefore, suggests that there is ultimately no trade-off between human rights and the containment of the coronavirus pandemic—what is good for human rights is good for public health.⁸⁵

IV. QUESTIONING LIBERAL NARRATIVES

The Chinese government has adopted some elements of the above-described liberal narratives on the coronavirus pandemic. In


addition to seeking to protect the employment rights of coronavirus patients, the government has denounced the local authorities’ initial suppression of information about the outbreak. Nevertheless, the overall message of the P.R.C. government has been that China’s one-party state has been crucial for tackling the pandemic.

Before discussing the Chinese government’s perspective to the pandemic, it may be helpful to note that the above-described liberal assumptions about public health have been contested outside China as well. This criticism takes many forms, but most fundamentally, it proposes that the liberal project to justify social arrangements through the liberal first principles must fail. In reality, it may be argued, liberal narratives exist to provide a layer of ideological gloss for political decisions that do not follow from the above-described first principles of liberalism. Depending on who is speaking, the quarantining of cities, regions, and countries may be deemed disproportionate and excessive—or these measures may be accepted as proportionate and the least restrictive measures available, considering the available resources and information. It is not the philosophical premises of liberalism that determine the use and acceptability of these measures, but something else altogether: the political culture of a given country, the competence and sensibilities of decision-makers, the resources available to public health authorities, the risk tolerance of decision-makers and citizens, and so forth. The same argument can be extended to the efficacy of public


87 See P.R.C. State Council, supra note 11, and infra text accompanying notes 104–106.


89 See supra text accompanying note 29.
health measures. The efficiency of public health measures in the present pandemic has depended on governmental competence, state capacity and the public’s trust in the state government—not on whether the government is liberal or not.\textsuperscript{90} Illiberal regimes may be competent and capable in certain regards, and at times they may even enjoy the public’s trust.\textsuperscript{91} Relatedly, both liberal and illiberal governments have failed their citizens in numerous ways in the coronavirus pandemic.\textsuperscript{92}

From a critical perspective, it also appears that there are few, if any, self-evident consequences from the respect for individual freedom and human agency, autonomy and dignity for public health policies and measures. For instance, a critic may point out that neither the expansion nor the restriction of the freedom of expression inevitably leads to better public health outcomes. In fact, liberal vocabulary is not incompatible with restricting the freedom of expression in order to achieve public health objectives. Such restrictions may even justify giving effect to individual agency, autonomy and human dignity. For instance, European courts have made health-related commercial speech “conditional upon the disclosure of sufficient and reliable information to consumers.”\textsuperscript{93} The justification for restrictions on such speech is not only the promotion of public health objectives (and, one may argue, the right to health) but also the promotion of individual autonomy, which is contingent on allowing individuals to make decisions on an informed basis.\textsuperscript{94} Respect for individual autonomy and human dignity may, therefore, justify restrictions on the freedom of expression in the field of public health. Conversely, liberal vocabulary may also be used to advocate the freedom of expression at the expense of public health

\textsuperscript{90} Fukuyama, \textit{supra} note 1.

\textsuperscript{91} \textit{Id.} For instance, Donald Clarke has argued that whatever trust investors may have in the Chinese government need not be based on formal enforceable rights. Donald C. Clarke, \textit{Economic Development and the Rights Hypothesis: The China Problem}, 51 AM. J. COMP. L. 89, 109–111 (2003).

\textsuperscript{92} See infra note 163.


\textsuperscript{94} \textit{Id.} at 231. See also Lars Noah, \textit{Truth or Consequences?: Commercial Free Speech vs. Public Health Promotion (at the FDA)}, 21 HEALTH MATRIX 31, 90–92 (2011) (discussing the possibility of the U.S. government restricting truthful commercial speech for public health reasons).
objectives. This is the case when pharmaceutical companies are allowed a wide scope of commercial speech, despite the adverse public health consequences of such speech.95

Rather than assuming that the human rights-based framework provides a single coherent policy framework for the coronavirus response, a critic may argue that rights claims in the coronavirus pandemic—say, claims about the right to health and the right to education—are mutually incompatible.96 A critic may also point out that the human rights-based approach recognizes no hierarchies between human rights and instead contends that all rights are interrelated and mutually re-enforcing.97 Such a posture provides no guidance on how to divide scarce resources in a public health emergency. The interrelatedness of all human rights has made the human rights-based approaches analytically fuzzy. It has also made the advocacy of the human rights-based approaches a difficult task in the public health community and especially within the WHO.98


98 See Helena Nygren-Krug, The Right to Health: From Concept to Practice, in ADVANCING THE HUMAN RIGHT TO HEALTH 39, 40 (Jose M. Zuniga et al. eds., 2013) (describing the conflicted ways in which human rights may be postulated); Seppänen, supra note 24, at 439.
Finally, a strand of criticism argues that the liberal emphasis on legal processes is misplaced and unjustified.\(^{99}\) There are sound policy reasons for not subjecting all public health policies to judicial review even in a liberal democracy. On the one hand, it can be argued that there is no necessary link between the liberal first principles and the *judicial* review of public health measures. The Siracusa Principles, for instance, refrain from calling for the judicial review of government decisions, being satisfied with “[a]dequate safeguards and effective remedies” for controlling abuses of power.\(^{100}\) On the other hand, it can be argued that the distribution of healthcare resources is too important a function to be left for the court system to decide. In jurisdictions where the right to health may be litigated, legal disputes about this right end up in courts in a more or less random order, and judges deciding such cases typically have insufficient resources to do so.\(^{101}\)

**V. ILLIBERAL EXCEPTIONALISM**

The above-described criticisms do not need to justify illiberal policies or political systems. Instead, they may be intended to expose the repressiveness and arbitrariness of liberal ideology in a call for more authentic human emancipation than what mainstream human rights language caters for. Nevertheless, these criticisms may also justify illiberal forms of government. In China, in particular, the critique of liberal narratives takes a politically meaningful form.\(^{102}\)


\(^{100}\) *Siracusa Principles*, supra note 3, at 18.


\(^{102}\) For an overview of Chinese critical scholarship, see generally Samuli Seppänen, *Ideological Renewal and Nostalgia in China’s “Avant-garde” Legal Scholarship*, 13 WASH. U. GLOB. STUD. L. REV. 83 (2014) (discussing three different strands of contemporary Chinese “avant-garde” legal scholarship). For a specific text, see JIANG SHIGONG (强世功), *LIFAZHE DE FALIXUE* (立法者的法理}
Indeed, the ongoing coronavirus pandemic has provided an opportunity for the Chinese leadership to taunt the superiority of Chinese-style socialism compared to liberal democracies. “Were it not for the unique institutional advantages of the Chinese system,” the China Daily explained (somewhat prematurely) in February 2020, “the world might be battling a devastating pandemic.”

According to Xi Jinping, the Chinese government’s actions in the coronavirus outbreak “once again demonstrated the notable advantages of the leadership of the [CCP] and the system of socialism with Chinese characteristics.” In Xi’s view, the CCP was able to deploy resources swiftly to fight the epidemic under the centralized, unified leadership of the Party.

China’s state-run media has advanced similar arguments about the benefits of the Chinese governance model. In liberalism the “state is a ‘necessary evil’ and its presence must be contained, otherwise it infringes on the rights of individuals,” whereas in the Chinese political tradition and in “eastern civilizations . . . the state, the Party and the people have

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105 Id. For the same argument by a Chinese scholar specializing on Marxism in the Chinese Academy of Social Sciences, see Liu Zhongxun (刘忠勋), Cong Yiqing Fangkong Kan Woguo Zhidu Youshi he Zhili Xiaoneng (从疫情防控看我国制度优势和治理效能) [From the Perspective of Epidemic Prevention and Control: China’s Institutional Advantages and Governance Effectiveness], CHINESE SOC. SCI. NET (Mar. 13, 2020), http://marx.cssn.cn [https://perma.cc/875D-UPUG] (attributing the success in controlling the pandemic to China’s institutional advantages and the leadership of the CCP). See also P.R.C. STATE COUNCIL, supra note 11 (stating that “[a]fter weathering the epidemic, the Chinese people have keenly realized that the [CCP] leadership is the most reliable shelter against storms.”).
shared interests.” Chinese media has cited the so-called community grid management system as a specific example of China’s state-centric and communal approach to public health. This system makes use of idiosyncratic Chinese governance institutions, such as neighborhood-level Party committees and their staff members as well as community-level healthcare providers, in disease control.

Yet, instead of extolling the benefits of a Marxist-Leninist dictatorship, Chinese Party leaders and ideologues often emphasize more widely appealing aspects of the Party’s governance model, such as the socialist rule of law principle. This principle not only comprises the strict obedience to the law, but also values such as equality before the law and (supposedly “socialist”) notions of formal

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109 Even the above-cited Global Times article emphasizes that the grid management system “is not an authoritarian machine.” See GLOB. TIMES, Community Grid System, supra note 106.
and substantive justice.\textsuperscript{110} Texts referring to this ideal allude to the notion of “Party leadership”, but the meaning of such leadership is seldom fleshed out in these texts or described as unbridled political domination.\textsuperscript{111} The Party is, according to its own self-perception, a modern, scientifically governed, rule-based organization.\textsuperscript{112}

The Chinese leadership and Xi Jinping himself have emphasized the rule-based nature of the Party’s governance model in their response to the coronavirus pandemic. Early on in the outbreak, Xi published an article in \textit{Qiushi}, the Party’s principal theoretical journal, arguing that it was of utmost importance to fight the epidemic in a “law-based, scientific and orderly manner.”\textsuperscript{113} The harder epidemic control and prevention was, Xi explained, the more important it was to adhere to the “rule of law” and to strengthen Chinese legislation on public health.\textsuperscript{114} A similar focus on legality can be found in the P.R.C. State Council’s white paper on the government’s response to the pandemic.\textsuperscript{115} The white paper explains that the government strengthened legal safeguards for epidemic prevention and control during the pandemic.\textsuperscript{116}

One aspect of this law-based response can be found in the Chinese Supreme People’s Court guiding opinions and model cases

\begin{footnotes}
\item 110 See \textit{ZHONGGONG ZHONGYANG ZHENGFA WEIYUANHUI (中共中央政法委员会) [CENTRAL POLITICAL & LEGAL COMMITTEE OF THE CHINESE COMMUNIST PARTY], SHEHUI ZHUZHI ZHENGZHI LINIAN DUBEN (社会治理法治理念读本) [Readings on the Socialist Rule of Law Principle]} 98–99, 104–109 (2009).
\item 111 See, e.g., id. at 111 (describing Party leadership as ideological leadership, political leadership and organizational leadership, without elaborating on the relationship between the Party and the judiciary).
\item 113 Xi Jinping (习近平), \textit{Quanmian Tigao Yifa Fangkong Yifa Zhili Nengli, Jianquan Guojia Gonggong Weisheng Yingji Guanli Tixi} (全面提高依法防控依法治理能力, 健全国家公共卫生应急管理体系) [Comprehensively Improving Law-Based Epidemic Prevention and Control and the National Public Health Emergency Management System], \textit{QIUSHI} (求是) [SEEKING TRUTH] (Feb. 29, 2020), http://www.qstheory.cn/dukan/qs/2020-02/29/c_1125641632.htm [https://perma.cc/HBK7-MBYU] [hereinafter Xi, \textit{Comprehensive Improving}]. For an English language description of the article, see Xi’s Article on Improving Epidemic Prevention and Control to be Published, \textit{XINHUA} (Mar. 1, 2020), http://www.china.org.cn/china/2020-03/01/content_75760592.htm [https://perma.cc/5J96-W452].
\item 114 Xi, \textit{Comprehensively Improving}, supra note 113.
\item 115 P.R.C. STATE COUNCIL, \textit{supra} note 11.
\item 116 Id.
\end{footnotes}
on coronavirus cases. In part, the Supreme People’s Court’s guidance supports individual rights. In its first set of guiding opinions on the coronavirus response, the Supreme People’s Court stated that Chinese people’s courts would not support the termination of employment contracts of employees who were suspected or confirmed coronavirus patients. At the same time, the Supreme People’s Court also made use of the self-consciously pragmatic aspects of Chinese legal thought, which emphasize the “social effects”, rather than the “legal effects” of a legal decision. In its guiding opinions, the Supreme People’s Court instructed lower level people’s courts to mitigate adverse economic effects from the

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118 Guanyu Yifa Tuoshan Shenli She Xinguan Feiyian Yiqing Minshi Anjian Ruogan Wenti de Zhidao Yijian (Yi) (关于依法妥善审理涉新冠肺 炎疫情民事案件若干问题的指导意见（一）) [Guiding Opinions Concerning the Proper Hearing of Cases Related to the Novel Coronavirus Epidemic (First)], supra note 117, ¶ 4.

pandemic through mediation and negotiation. The model cases released to illustrate this aim describe how Chinese businesses from fitness clubs to building companies and slaughter houses have been able to default on their contractual obligations without being forced into liquidation. The Chinese people’s courts’ role in the coronavirus response is not, therefore, only to enforce individual rights but also to prevent the enforcement of such rights from causing harmful social effects.

The Party’s response to the pandemic is not limited to legal processes even in their most pragmatic form. A Marxist-Leninist political party, such as the CCP, does not base its legitimacy on the observance of legal processes or, it can be argued, any other rules, including its own internal regulations. Instead of adhering to legal and other rule-based processes, the supposed advantage of a communist party leadership compared to liberal democracies is its ability to embody the will of the proletariat, which is remaking the world under the laws of dialectical and historical materialism.

CCP ideology presumes that the Party represents “advanced

120 Guanyu Yifa Tuoshan Shenli She Xinguan Feiyan Yiqing Minshi Anjian
Ruogan Wenti de Zhidao Yijian (Yi) (关于依法妥善审理涉新冠肺炎疫情民事案件若干问题的指导意见（一）)[Guiding Opinions Concerning the Proper Hearing of Cases Related to the Novel Coronavirus Epidemic (First)], supra note 117; ¶ 1.


122 For similar legislative measures in other countries, see supra note 18.


124 See generally LENIN, supra note 123 (explaining the advantages of communist party leadership).
production forces, advanced culture and the overwhelming majority of the Chinese people.”

Since the actions of Party leaders are presumed to reflect the advanced forces in society, it is ultimately up to the Party leaders to decide when to follow established legal and other rule-based processes and when to abstain from them. Formal legality is, therefore, a concern for Party leaders and ideologues, but it does not have the same role in the CCP’s governance project as it does in the liberal narratives on public health.

One consequence of this governance model is skepticism towards formal bureaucratic processes. Early on in the coronavirus outbreak, Xi Jinping warned about the dangers of “bureaucratism and the practice of formalities for formalities’ sake,” which slowed the government’s effort to contain the outbreak. An editorial in the influential People’s Daily opined that “formalism” was a “chronic disease and no less contagious than an epidemic.” Indeed, Wuhan

126 Among other things, this implication is achieved through the principle of democratic centralism, which holds that “all Party members must . . . . firmly uphold the authority and centralized, unified leadership of the Central Committee with Comrade Xi Jinping at the core . . . . ” Zhongguo Gongchandang Zhangcheng (中国共产党章程) [Constitution of the Communist Party of China] (rev’d by and adopted at the 19th National Congress of the Communist Party of China, Oct. 24, 2017), § General Program, http://language.chinadaily.com.cn/19thcpcnationalcongress/2017-11/06/content_34191468.htm [https://perma.cc/ZB5D-NVLD] (introducing the principle of democratic centralism). The matter is, however, paradoxical, since the Party also instructs its members to “set a fine example in abiding by the laws and regulations of the state.” Id. at art. 3. See also Liu, infra note 171 (discussing the principles established in the Constitution of the Communist Party of China).
128 See Fangkong ye Guo Xingshi Zhuyi, Yao Zewen Geng Yao Wenze(防控也搞形式主义, 要问责更要问责) [Formalism in Prevention and Control Must Be Called to Account and Condemned], PEOPLE’S DAILY (Feb. 2, 2020),
authorities’ failure to take timely action against the coronavirus outbreak can be seen as a consequence of the ills of bureaucratism and formalism. As a new disease, coronavirus was not on a list of designated infectious diseases, which would have triggered reporting obligations within the Chinese healthcare system. The “bureaucratic and formalist” organizational culture—in effect, rigid and hierarchical reporting mechanisms and the incentives to avoid responsibility for unwelcome news—allowed local authorities in Wuhan to keep Beijing in the dark about the outbreak. Party leaders, therefore, aim to ensure that “formalism” does not stand in way of effective disease control. One means for doing this is the Party’s internal discipline supervision. Discipline supervision is “extra-legal” in the sense that it is outside the purview of the Chinese people’s courts (which themselves are under the Party’s control).

In the context of the coronavirus pandemic, the Party’s Central Commission for Discipline Inspection (CCDI) has decreed that Party cadres must “deeply understand the spirit of General Secretary Xi Jinping’s important instructions and important speeches.”


130 For Chinese legal scholarship discussing the problems with the organizational culture in the pandemic, see Wang Jianglian (汪江连), Xinguan Feiyan Yiqing Fangkong ying Shiyong “Weiji Fazhi” (新冠肺炎疫情防控应适用“危机法治”) [Apply “Crisis Rule of Law” to Coronavirus Epidemic Prevention and Control], PKUL (Feb. 19, 2020), http://pkulaw.cn/fulltext_form.aspx?Gid=335655869&Db=art [https://perma.cc/3XRS-FVHU] (arguing the importance of adopting “crisis rule of law” to combat bureaucratism). See also GLOB. TIMES, Probe Findings on Li Wenliang, supra note 86 (describing how local authorities prevented Dr. Li Wenliang from posting the information of the pandemic online).


132 CCDI, supra note 21.
staff in discipline inspection commissions must also “struggle heroically” and target “formalist bureaucratic practices.”¹³³

Perhaps as a consequence of the Party’s ambiguous approach to formalism and legality (which are two separate issues), some of the disease control measures deployed by the Chinese government in the coronavirus pandemic have allegedly violated Chinese laws, as mentioned in Part II above. Professor Shen Kui of Peking University Law School, for instance, has pointed out that all restrictions on the personal rights of Chinese citizens need to be based on laws adopted by the National People’s Congress and its Standing Committee.¹³⁴ In the field of public health, the use of coercive measures, such as isolations, quarantines and lockdowns, must follow the processes set up in the P.R.C. Law on the Prevention and Control of Infectious Diseases.¹³⁵ Shen Kui argues that many measures adopted by local authorities, such as the coercive home quarantining of people in Zhejiang province described in Part II above, violated this process.¹³⁶ Professor Tong Zhiwei from the East China University of Political Science and Law has expressed similar concerns about the coercive isolation of people in their homes.¹³⁷ Zhao Hong, a professor at the China University of Political Science and Law in Beijing, has argued that restrictions on the freedom of movement in large Chinese cities and the banning of public gatherings “clearly violated legal

¹³³ Id.
¹³⁴ See generally Shen, supra note 20 (urging the importance of respecting basic human rights in the pandemic).
¹³⁵ Id.; see generally Zhonghua Renmin Gongheguo Chuanranbing Fangzhi Fa (中华人民共和国传染病防治法) [P.R.C. Law on the Prevention and Control of Infectious Diseases] (promulgated and rev’d by the Standing Comm. Nat’l People’s Cong., June 28, 2004, effective Dec. 1, 2004), art. 43 [hereinafter P.R.C. Law on the Prevention and Control of Infectious Diseases] (stipulating the procedural requirements for the declaration of affected areas, the adoption of emergency measures, and the implementation of lockdowns).
¹³⁶ See Shen, supra note 20 (arguing against measures infringing personal freedom).
¹³⁷ See Tong, supra note 20 (criticizing measures adopted by local governments to limit personal freedom).
stipulations.” Concerns about rights infringements in the pandemic have also appeared in the Chinese mainstream media.

VI. IDEOLOGICAL UNMASKING

Advocates of both liberal and illiberal narratives can argue that the coronavirus pandemic reveals endemic weaknesses in the opposite ideological outlook. From the illiberal perspective, the pandemic has demonstrated that liberal governments are inefficient and hypocritical. The critique against the inefficiency of liberal regimes is a classic theme in illiberal political thought. Nineteenth and twentieth century opponents of liberalism argued that liberal governments were unwilling to restrict civil and political rights in an emergency situation and, as a consequence, they were unable to fight against various emergencies and political insurgences, in particular. From the illiberal perspective, specific concepts of


139 See generally Cai Fei (蔡斐), Ruci Zhan “Yi”, Qunzhong hen Shengqi (如此战“疫”，群众很生气) [In This Battle Against the Epidemic, People Are Upset], RENMINWANG (Feb. 17, 2020), http://opinion.people.com.cn/n1/2020/0217/c223228-31591169.html [https://perma.cc/EK3U-F5XS] (discussing the need for strict law application in emergency situations).

140 See generally Mo, supra note 11; Wang Xiangsui (王湘穂), Yihou Shidai de Quanqiu Geju yu Zhong-Mei Guanxi (疫后时代的全球格局与中美关系) [The Global Landscape of the Post-Epidemic Era and Sino-US Relations], At SIXIANG (May 15, 2020), http://www.aisixiang.com/data/121697.html [https://perma.cc/F56J-GH8A] (arguing that the U.S. and Europe have fared poorly in their coronavirus response and discussing the U.S. President Donald Trump’s effort to shift the blame for the inefficient coronavirus response to China); Yang Sheng, Trump Tweet Infuriates China, GLOB. TIMES (Mar. 18, 2020), https://www.globaltimes.cn/content/1182873.shtml [https://perma.cc/47MX-EBBU] (discussing the opinion that U.S. President Donald Trump is trying to “cover his administration’s terrible response” by blaming China).

141 See generally JUAN DONOSO CORTÉS, SPEECH ON DICTATORSHIP (1849), reprinted in SELECTED WORKS OF JUAN DONOSO CORTÉS 45, 46 (Jeffrey P. Johnson trans., 2000) (stating that a dictatorship is a legitimate form of governance when law is not enough to save society); CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 63 (George
liberal legal thought, such as the principle of proportionality, encourage inaction in the face of public health emergencies. In the coronavirus pandemic, a critic may argue, principles and processes that were designed for previous epidemics delayed or prevented liberal democracies from taking measures that were necessary to combat the new virus. For instance, the initial applications of the IHR to the coronavirus outbreak concluded that there was no scientific evidence for the efficiency of travel restrictions, and that such restrictions, therefore, violated the dignity, human rights and fundamental freedoms of persons.

Schwab trans., 2005) (describing liberalism as negotiation and “a cautious halfmeasure”).

The principle of proportionality requires that a limitation of a right be appropriate and necessary. See Garde, supra note 93, at 242 (discussing the principle of proportionality). See also SIRACUSA PRINCIPLES, supra note 3, at art. I, § A, ¶ 10 (defining “necessity” as proportionality).

See Mo, supra note 11 (stating that many capitalist governments’ response to the pandemic was slow and full of loopholes and arguing that China’s performance in combating coronavirus illustrated the advantages of its socialist system).

Roojin Habibi et al., Do Not Violate the International Health Regulations During the COVID-19 Outbreak, 395 LANCET 664 (2020), https://doi.org/10.1016/S0140-6736(20)30373-1 [https://perma.cc/F3EJ-F876] (arguing that the travel restrictions against China (i) were not supported by scientific evidence; (ii) did not constitute the least restrictive means; (iii) could not be adopted as a precaution under IHR; and (iv) consequently failed to restrict the dignity, human rights and fundamental freedoms of persons). For earlier research on travel restrictions, see Ana L.P. Mateus et al., Effectiveness of Travel Restrictions in the Rapid Containment of Human Influenza: A Systematic Review, 92 BULL W.H.O. 868 (2014) (asserting that travel restrictions can delay but cannot prevent the dissemination of influenza). Rights-based views were published in Chinese media at the beginning of the outbreak. See Wang Xigen (汪习根), “Yiqing Qishi” shi duo Renquan de Wuqing Tiaozhan (“Epidemic Discrimination” is a Relentless Challenge to Human Rights], PEOPLE’S DAILY (Feb. 18, 2020), http://paper.people.com.cn/rmrb/html/2020-02/18/nw.D110000renmr_20200218_1-11.htm [https://perma.cc/D32Y-VJD2] (arguing against discrimination arising out of the pandemic). See also Richard Pérez-Peña, Virus Hits Europe Harder Than China. Is That the Price of an Open Society?, N.Y. TIMES (Mar. 19, 2020), https://www.nytimes.com/2020/03/19/world/europe/europe-china-coronavirus.html?referringSource=articleShare [https://perma.cc/T6ZL-JABH] (arguing that the virus has hit Europe harder because “governments aren’t used to giving harsh orders, and citizens aren’t used to following them”).
authentic application of the IHR at the time (although not the only possible interpretation), but from a critical perspective it also demonstrated the inefficiency of rights-based processes. A promoter of illiberal narratives and of Chinese-style Marxism, in particular, may contrast liberal rights-based approaches (unfavorably) with the mobilization of masses in the Chinese “people’s war” against the pandemic.

Another classic theme in illiberal political thought accuses liberalism of hypocrisy. Liberal principles, according to this criticism, provide an ideological mask for a regime that is in certain foundational ways as repressive as illiberal regimes. In an emergency, the classic illiberal argument runs, liberal indecisiveness either proves fatal (potentially causing the liberal regime to be replaced by an illiberal political order) or it is discarded in favor of measures that are not based on liberal first principles in any meaningful way. A critic may point out that in the present

145 The IHR requires, *inter alia*, that health measures be based on scientific principles and available scientific evidence. If scientific evidence is insufficient, the health measures must be based on “available information including from WHO and other relevant intergovernmental organizations and international bodies.” *See World Health Organization [WHO], International Health Regulations*, art. 43, ¶ 2 (3rd ed. 2015). IHR also provides that the “implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.” *See id.* at art. 3, ¶ 1. In retrospect it can be said that the available scientific evidence at the beginning of the pandemic was insufficient and that the restrictions were, therefore, allowed under IHR. In the beginning of the pandemic, however, scholars were operating on evidence from previous epidemics. *See generally* Habibi et al., *supra* note 144.


pandemic, governments in liberal democracies have taken up measures that are similar or identical to those first adopted by the Chinese government. Following China’s example, for instance, the Italian government placed individual provinces, and finally the entire country, under a police-enforced lockdown. The assumption that such measures were legitimate because their subjects agreed to them, or could have agreed to them, through a democratic process appears disingenuous to a critic. When individuals contest coercive measures in a court of law or elsewhere, they demonstrate their disagreement with these measures, even though the same individuals agreed to, or could have agreed to, these measures in a democratic process. For a critic, the role of the liberal narratives is, therefore, to add ideological gloss to any action that a liberal democratic government takes (or does not take).

To be sure, the measures adopted in Italy and in other liberal democracies were not as strict as those taken in China, and in particular, in Wuhan. In contrast to Wuhan, where residents were locked inside their apartments and monitored and supported by community workers, Italians were able to go out shopping and take care of other urgent needs. While the Italian measures were more lenient, a critic may point out that they were also less efficient than the Chinese ones. Lenient lockdown measures in the United States and the United Kingdom also had worse results (in terms of casualties)

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compared to the Chinese methods.\footnote{See Coronavirus Disease 2019 (COVID-19) Situation Report 60, WORLD HEALTH ORGANIZATION [WHO] (Mar. 19, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200320-sitrep-60-covid-19.pdf?sfvrsn=d2bb4f1f_2 [https://perma.cc/UQH6-PWAE] (displaying reports on the coronavirus pandemic situation from countries around the world).} From the illiberal perspective, the Chinese government’s coronavirus response may have appeared excessively repressive to liberal sensibilities, but it protected Chinese citizens from the disease more effectively than the measures adopted in liberal democratic regimes.\footnote{See WHO, supra note 7, at 16–18 (describing China’s public health measures against coronavirus outbreak as “ambitious, agile and aggressive,” as well as “bold” and “science-based”); Editorial: COVID-19: Too Little, Too Late?, 395 LANCET 755 (2020), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930522-5 [https://perma.cc/2KBK-FNGX] (stating that “the colossal public health efforts of the Chinese Government have saved thousands of lives”); Editorial: Emerging Understandings of 2019-nCoV, 395 LANCET 311 (2020), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930186-0 [https://perma.cc/7BG6-CFXS] (stating that “Chinese authorities are meeting international standards”).} A promoter of illiberal narratives may, consequently, conclude that liberal governments were willing to accept more casualties in the pandemic than the P.R.C. government.\footnote{See Schneider, supra note 14 (predicting that America will become the world’s most infected country, despite its confidence in its own system). Although not making this claim explicitly, the P.R.C. State Council’s white paper on the coronavirus pandemic emphasizes that the Chinese government prioritized people’s lives instead of economic interests in its response. P.R.C. STATE COUNCIL, supra note 12.}

The liberal response to such critiques may reassert the inherent value of the liberal first principles and the institutions that are justified on those bases. As imperfect and aspirational as liberal democratic institutions may be, allowing government agencies or Communist Party cadres to impose public health measures without democratic and judicial oversight would be a far worse arrangement. Since liberal first principles are protected by legal rights, it is the judiciary—rather than, say, the CCP’s discipline inspection organs—that is best placed to determine the extent of these rights.\footnote{See Alicia Ely Yamin, Promoting Equity in Health: What Role for Courts?, 16 HEALTH & HUM. RTS J. 1, (2014) (noting the critical role of litigation for basic human dignity and non-discrimination in health care).} The present pandemic is no reason to give up the rights-based approach
to health, let alone the liberal democratic governance model, even though some rights may need to be momentarily restricted and even though public health outcomes in liberal democracies may be worse by some measures than those in the P.R.C.\textsuperscript{156} Such setbacks are not the ultimate test for the legitimacy of liberal democracies. In any event, the coronavirus pandemic is not an existential crisis or a war-like event for liberal democracies, as it tellingly is for the P.R.C. according to the Chinese government’s own white paper on its coronavirus response.\textsuperscript{157}

In this context, a promoter of the liberal approaches may concede that the above-described claims of the human rights-based approach are analytically unhelpful.\textsuperscript{158} Perhaps it is analytically clearer to frame human rights conceptions as checks and balances on public health measures, rather than to assume that human rights and public health measures are inherently interrelated and mutually enforcing. Human rights protections may sometimes lead to worse public health outcomes than uninhibited government action. Nevertheless, the argument remains that this is an acceptable outcome for organizing society through the liberal first principles.

From the liberal perspective—and indeed from any perspective that is critical of illiberal narratives on political power—the coronavirus pandemic also reveals the inherent fragility of illiberal political systems.\textsuperscript{159} As described above, a central justification for illiberal regimes is their ability to provide results-based political leadership, which transcends liberal law-based governance. Unbridled by legal and participatory processes, the

\begin{footnotes}
\footnote{\textsuperscript{156} See Babones, supra note 5 (demonstrating how those with a liberal perspective may find the approach from China to be unappealing despite the outcomes that can result from such measures being put in place).}
\footnote{\textsuperscript{157} See P.R.C. State Council, supra note 12 (describing the pandemic as a “great war”) and infra text accompanying note 164.}
\footnote{\textsuperscript{158} See supra text accompanying notes 61–65 (regarding the interrelatedness of public health measures and human rights promoted by the human rights-based approach) and 93–95 (regarding the critique of the interrelatedness of public health measures and human rights).}
\footnote{\textsuperscript{159} See, e.g., Editorial: Virus Exposes China’s Achilles’ Heel, TAIPEI TIMES (Feb. 7, 2020), https://www.taipeitimes.com/News/editorials/archives/2020/02/07/2003730505 [https://perma.cc/PR8T-W297]; Kavanagh, supra note 1, at 136; Pei, supra note 1 (discussing examples of fragility in the illiberal political systems from the liberal perspective).}
\end{footnotes}
Chinese party-state can build hospitals in a matter of days.\textsuperscript{160} Nevertheless, when such direct action fails to yield positive results, or when it appears that the illiberal government model itself has adverse consequences for people’s wellbeing—as many in China thought was the case in the first few months of the coronavirus outbreak—illiberal leaders cannot fall back on arguments about liberal first principles to legitimize their power. Indeed, a critic may point out that the repression of civil and political rights has stifled many parts of the Chinese society, built up dissent, and prevented grassroots information from reaching central authorities.\textsuperscript{161} Judging by the postings on Chinese social media in the early stages of the pandemic in January and February 2020, many Chinese citizens did not see the initial cover-up of the coronavirus outbreak as a glitch or an anomaly of China’s one-Party system, but as its predictable outcome.\textsuperscript{162} The public criticism abated as the government’s response proved effective against the virus.\textsuperscript{163} Yet the Chinese

\textsuperscript{160} See Liu, supra note 105 (explaining how the Chinese socialist system allows the government to concentrate on accomplishing major tasks such as building hospitals in a short amount of time).

\textsuperscript{161} See Liu et al., Antagonists exploit Dr Li’s death to slander China, GLOB. TIMES (Feb. 8, 2020), https://www.globaltimes.cn/content/1178876.shtml [https://perma.cc/6JLH-Y84W] (detailing the Chinese government’s efforts to control public discourse during the pandemic). For stability maintenance in China, see XUEZHI GUO, CHINA’S SECURITY STATE: PHILOSOPHY, EVOLUTION, AND POLITICS 418–419 (2012). For an assessment of China’s social and political conditions today, see CARL MINZNER, END OF AN ERA: HOW CHINA’S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE (2018); Cf. Eric Li, Xi Jinping Is a ‘Good Emperor’, FOREIGN POL’Y (May 14, 2020), https://foreignpolicy.com/2020/05/14/xi-jinping-good-emperor-coronavirus/ [https://perma.cc/7U5M-CRJZ] (describing how the pandemic has increased some people’s trust in the Communist Party).


government itself has recognized that the pandemic was “a major test” for the Chinese party-state, and that its outcome was not a preordained matter.\footnote{P.R.C. STATE COUNCIL, supra note 12.} In the next emergency, the government’s efforts may not turn out to be as effective.

For a critic, the precariousness of illiberal regimes is highlighted and exacerbated by Chinese political leaders’ conflicting approach to formal legal processes. As pointed out above, Chinese leaders simultaneously call for the strict implementation of the rule of law principle in the management of the coronavirus pandemic, while they also fight against formalism and bureaucratism.\footnote{See supra text accompanying notes 127–133.} In the Party ideologues’ mind, the two objectives belong to a coherent governance ideology.\footnote{For a statement about the role of formal law in fighting formalism, see Xia Chuntao (夏春涛), Tuijin Yifa Zhiguo Zhongzai Jianchi Dang de Lingdao (推进依法治国重在坚持党的领导) [Promoting Ruling the Country According to Law and Upholding Party Leadership], CPC NEWS (Nov. 26, 2014) http://theory.people.com.cn/n/2014/1126/c40531-26098237.html [https://perma.cc/8LCB-GQLJ].} The rule of law stands for the dutiful (but not too dutiful) observance of national laws and Party regulations, whereas bureaucratism and formalism are reflected by inefficient action and work practices. There are problems in this system—such as the bureaucratic reporting practices of epidemic outbreaks—but they can be ironed out through legal and institutional reforms.\footnote{Wang, Apply “Crisis Rule of Law” to Coronavirus Epidemic Prevention and Control, supra note 130.} Chinese legal scholars have, for instance, called for legal reforms, which would allow disclosure of necessary information, while suppressing undesired, socially harmful speech.\footnote{See Hu Jinguang (胡锦光), Yifa Fangyi Neng Baozheng Zhengfu Gongxinli (依法防疫能保证政府公信力) [Preventing the Epidemic in Accordance with Law Can Ensure Governmental Credibility], AI SIXIANG (May 3, 2020), http://www.aisixiang.com/data/121147.html [https://perma.cc/R49J-MEXZ] (discussing legal reforms such as providing sufficient legal justification for public health measures). For reform calls, see also Wang, Apply “Crisis Rule of Law” to Coronavirus Epidemic Prevention and Control, supra note 130 (discussing reforms to improve disclosure of information during pandemics).} Such reform calls...
rest on the notion that it is possible to make the Chinese party-state predictably governed and transparent.

From a critical perspective, however, it appears that such reform attempts clash with the basic tenets of the Party’s governance project. During the present pandemic, Party leaders have made use of laws and regulations to rein in local Party cadres, who violate the commands of the central leadership. Yet the same laws and regulations can also be used to criticize the central government’s commands. As long as Party leaders emphasize ideological conformity, disclosing inconvenient facts about the reality risks running afoul of the officially sanctioned versions of that reality. A critic may wonder whether Party leaders truly are willing to create a culture of formalism within the state and Party organs, which would allow the airing of important concerns about Chinese society. Such a culture could eventually be used to hold Party leaders accountable for their actions. Indeed, it appears that no matter how Chinese disease control and prevention laws are formulated, China’s one-party system will end up providing Party cadres extralegal powers to trump inconvenient interpretations of legal norms—and attempts to disclose information about, say, future public health threats.

To be sure, the above-described arguments are not fatal for any ideological project. Facing criticism, defenders of liberal and illiberal ideological narratives may simply restate their core articles of faith and hope that, in the final analysis, it is their ideological position that most credibly accounts for the unfolding events. Depending on one’s perspective, the high human and economic costs of the pandemic in liberal democracies can attest to the inefficiency and relative disregard for human life and dignity in liberal regimes—or to the robustness of liberal democracies, which can afford to address public health emergencies in a less than efficient manner.

169 See XINHUA, Xi Stresses Law-based Infection Prevention, supra note 15 (describing Xi’s instructions to Party committees and governments at all levels to improve law-based governance).
170 See supra text accompanying notes 136–138 (listing criticisms from liberal-minded academics and lawyers towards coercive public health measures).
171 For such opportunities, see Liu Songshan (刘松山), Dang de Lingdao Xieru 1982 nian Xianfa de Lishi Huigu yu Xin Qidai (党的领导写入1982年宪法的历史回顾与新期待) [A Historical Review and New Expectation On the Party’s Leadership in the 1982 Constitution], HENAN CAIJING ZHENGFA DAXUE XUEBAO (河南财经政法大学学报), no. 3, 2014, at 1, 18.
without jeopardizing their very existence. Conversely, the P.R.C. government’s ability to respond to public health emergencies is either compromised by the ills of illiberalism—or aided by the regime’s ability to suspend rights and legal processes for the greater good. Promoters of both narratives can also rely on counterfactual arguments. The pandemic would have unfolded in a less damaging manner, if liberal democratic governments had adhered to the rights-based approach more closely—or if the P.R.C. government had been more centralized and less formalist and bureaucratic. The role of ideological narratives is to help people make such leaps of faith.

VII. CONCLUSION

This Article has provided a tentative sketch of liberal and illiberal ideological narratives on the coronavirus pandemic. To a large extent, these narratives highlight the idiosyncratic aspects and, more critically, endemic weaknesses, of the opposing ideological outlook. From the illiberal perspective, promoters of liberal narratives on governance and public health can be said to focus too much on procedural legitimacy and, consequently, they appear to be ill-placed to acknowledge and respond to public health emergencies. From the liberal perspective, advocates of illiberal narratives appear to be responding to a never-ending emergency situation and, consequently, they seem unable to take full advantage of procedural legitimacy and rule-based governance in order to prevent public health emergencies from occurring. The unsettled nature of these ideological arguments and the anomalies they bring out also puts into question the basic assumptions of both narratives. On the one hand, it seems aspirational—or outright fictious—to argue that the coronavirus response in liberal democracies is based on respect for individual freedom, human dignity and other liberal first principles. On the other hand, the image of a strong stable government projected by the CCP seems to be based on aspirational notions about the coherence and resilience of the Party’s governance project. In the middle of the coronavirus pandemic, it appears that the coronavirus follows no ideological script.